

Australian Taxation Law



® CCH

a Wolters Kluwer business

22nd Edition

Woellner
Barkoczy
Murphy
Evans
Pinto

2012

Australian Taxation Law

Acknowledgments

Robin Woellner dedicates this book to Gil, Glad, Ruth, Sally, Helen and Cheryl;
Stephen Barkoczy to Mei-Ling, Stephen and Johnnv;
Shirley Murphy to Bill and Marjory; Chris Evans to Kate Collier; and
Dale Pinto to Dudley, Dagmar, Joseph and Isaac.



CCH

a Wolters Kluwer business

Australian Taxation Law

22nd Edition

Woellner
Barkoczy
Murphy
Evans
Pinto

2012

CCH AUSTRALIA LIMITED

GPO Box 4072, Sydney, NSW 2001

Head Office North Ryde

Phone: (02) 9857 1300 Fax: (02) 9857 1600

Customer Support

Phone: 1 300 300 224 Fax: 1 300 306 224

www.cch.com.au

Book Code: 39321A

About CCH Australia Limited

CCH Australia Limited is part of a leading global organisation publishing in many countries. CCH publications cover a wide variety of topical areas, including tax, accounting; finance, superannuation, company law, contract law, conveyancing, torts, occupational health and safety, human resources and training.

Related publications

To keep readers abreast of changes to the income tax law, CCH publishes — in print, CD and online — a wide variety of services, from newsletters to detailed commentary analysing the law. These include the *Australian Federal Tax Reporter* (and its companion service, the *Australian Federal Income Tax Reporter*, which covers the *Income Tax Assessment Act 1997*), the *Australian Master Tax Guide*, *Foundations of Taxation Law*, the *Core Tax Legislation & Study Guide*, the *Australian Taxation Study Manual*, and the *Australian Tax Casebook*.

For all the CCH publications in this area, contact CCH Customer Support on 1300 300 224 or refer to the catalogue on CCH's website at www.cch.com.au.

ISBN 978 1 921948 32 9

ISSN 1324-809X

First edition	September 1987	Fourteenth edition	December 2003
Second edition	February 1990	Fifteenth edition	December 2004
Third edition	December 1990	Sixteenth edition	December 2005
Fourth edition	January 1993	Seventeenth edition	December 2006
Fifth edition	December 1994	Reprinted	March 2007
Sixth edition	January 1996	Eighteenth edition	December 2007
Seventh edition	January 1997	Nineteenth edition	January 2009
Eighth edition	December 1997	Reprinted	June 2009
Ninth edition	December 1998	Twentieth edition	December 2009
Tenth edition	November 1999	Reprinted	July 2010
Eleventh edition	December 2000	Reprinted	September 2010
Twelfth edition	December 2001	Twenty-first edition	December 2010
Thirteenth edition	December 2002	Twenty-second edition	December 2011

© 2012 CCH Australia Limited

All rights reserved. No part of this work covered by copyright may be reproduced or copied in any form or by any means (graphic, electronic or mechanical, including photocopying, recording, recording taping, or information retrieval systems) without the written permission of the publisher.

Important disclaimer

No person should rely on the contents of this publication without first obtaining advice from a qualified professional person. This publication is sold on the terms and understanding that (1) the authors, consultants and editors are not responsible for the results of any actions taken on the basis of information in this publication, nor for any error in or omission from this publication; and (2) the publisher is not engaged in rendering legal, accounting, professional or other advice or services. The publisher, and the authors, consultants and editors, expressly disclaim all and any liability and responsibility to any person, whether a purchaser or reader of this publication or not, in respect of anything, and of the consequences of anything, done or omitted to be done by any such person in reliance, whether wholly or partially, upon the whole or any part of the contents of this publication. Without limiting the generality of the above, no author, consultant or editor shall have any responsibility for any act or omission of any other author, consultant or editor.

Printed in Australia by McPherson's Printing Group

Foreword to the first edition

If two of the important criteria of a “good” taxation system are simplicity and certainty (§1-190 and §1-195), the Australian taxation system and particularly the *Income Tax Assessment Act 1936* fail the test miserably. The spate of anti-avoidance legislation, a reaction to the excesses of the tax avoidance era of the seventies, and the more recent taxation reform package have brought about legislation of almost unrivalled complexity.

The legislation is in some cases unintelligible: without a commerce or law degree the ordinary taxpayer stands no chance of finding his way through the morass and even with these qualifications his advisers will of necessity have to struggle to make sense of language that is as convoluted as it is confusing. Nor is the task of the taxation officer any easier. Many provisions in the legislation are not applied for the simple reason that no one is able to comprehend them. The need for a work that will operate as a guide to the traveller through these murky waters is painfully apparent.

In 1946, Mr Hannan, in his “Treatise on the Principles of Income Taxation”, while advertent to the desirability of enunciating a series of authoritative propositions (on s 51(1)), resignedly accepted the impossibility of such a task. Some 40 years on, the possibility of formulating authoritative principles on any matter relating to tax is even more daunting. The torrent of decisions, judicial and administrative, that has been handed down over that time, together with the outpourings of the legislature, have made the study of taxation almost unmanageable.

The need for a systematic approach to the study of taxation is obvious enough to the student. If the student were to see taxation as involving no more than an endless series of individual instances no overview of the subject would be possible. But it is not only the student who is in need of a systematic approach to the problem. The practitioner who is unaware of the system will have endless difficulty even finding the problem, let alone proceeding to a solution for that problem.

So it is not the student alone who will benefit from the present work. Indeed there are to be found discussed in these pages many of the great taxation issues of the present, without an appreciation of which it would be impossible to predict the outcome of particular factual situations.

By way of example, no issue could be more significant in the judge-made law of income taxation than the issue of the role of purpose in s 51(1) of the Act. The course of authority from *Ure v FC of T* 81 ATC 4100 and *Ilbery v FC of T* 81 ATC 4661 to the more recent cases of *FC of T v Just Jeans Pty Ltd* 87 ATC 4373 and *FC of T v John* 87 ATC 4713 have been a judicial reaction to tax avoidance; yet the boundaries of the doctrine (that purpose is relevant) are far from clear.

Two taxpayers incurring the same outgoings in circumstances identical save for their subjective motives and purposes should be treated in the same way for the purposes of an income tax law. To grant a taxation deduction to the taxpayer who is naive, while denying it to the taxpayer who is sophisticated, would be arbitrary. If an outgoing is incurred in circumstances where there is, objectively seen, a connection between the incurring of the outgoing and the activity which is directed towards the production of assessable income, that outgoing should satisfy the tests of deductibility irrespective of either subjective motivation or purpose.

Once it is accepted (as it must presently be) that subjective purpose intrudes to some extent into the issue of deductibility (albeit not necessarily as a test of deductibility), there is opened up the question whether the relevant purpose is the sole purpose, the dominant purpose or some purpose less than the dominant purpose. For the present these issues are best discussed, in *Magna Alloys & Research Pty Ltd v FC of T* 80 ATC 4542, in judgments in which two members of the present High Court, then sitting in the Federal Court, participated.

What, however, has not yet been the subject of discussion is the problem thrown up when a deduction is disallowed on the basis, say, that it was incurred for the sole purpose of obtaining a tax deduction, yet assessable income is in fact derived in the course of the scheme. Is the assessable income to be ignored, or is the result that the deduction only is to be ignored, leaving the taxpayer nevertheless in receipt of the assessable income upon which he is then to be taxed? Further in deduction cases, what role does an anti-avoidance section play?

In the long run, however, it is not the “common law” of taxation that holds the greatest significance. If there is one lesson that must be learned by anyone who wishes to understand taxation it is this: Go back to the Statute and read it!

One of the all time great taxation advisers was once asked a question by a client concerning s 51(1). The adviser had undoubtedly read the section hundreds, perhaps thousands of times. Yet, perhaps to the surprise of his lay client, he opened the Statute, perused the words and tested the issue by reference to the words he read. There is no other alternative.

So it is, that the authors of the present work return the reader to the Statute, offering on the way a helpful summary of its salient features.

Australia has over the years been well served by its taxation literature — the present work continues the tradition.

23 September 1987

Graham Hill, QC

Preface to the twenty-second edition

This twenty-second edition of *Australian Taxation Law* incorporates major legislative, case law and administrative reforms that have taken place in taxation law up to 1 July 2011, as well as various developments that have occurred since that date. There have been many content changes made throughout the book, to ensure that the book remains the most up to date text available.

As with prior editions, our main aim has been to explain the increasingly complex and voluminous taxation laws in clear and simple language. In order to achieve this, we have made extensive use of flow-charts and practical examples, to make it easier to understand the application of theory to practical situations.

We have continued to focus on the federal taxation system, with particular emphasis on income tax, capital gains tax, corporate tax, fringe benefits tax, as well as significant analysis of the ubiquitous goods and services tax. This edition also includes an analysis of the Henry Tax Review's reform proposals and subsequent developments.

We wish to acknowledge the significant contribution by the editing and production staff at CCH, in particular Marcus Lai, Mary Zachariah, Kenny Ng, Ahmad Nubly Isahak, Lai Li Kuan, Mohd Ashraf Mohd Rafdzi and Beverley Kirkby.

Finally, and most importantly, we must thank our families, whose ongoing support, encouragement and sacrifices make completion of each edition possible.

December 2011

RH Woellner

S Barkoczy

S Murphy

C Evans

D Pinto

CCH Acknowledgments

CCH Australia Limited wishes to thank the following who contributed to and supported this publication:

Managing Director: Matthew Sullivan

Director, Books: Jonathan Seifman

Publisher, Books: Andrew Campbell

Commissioning Editor: Kate Aylett-Graham

Senior Editor, Books: Marcus Lai

Writer: Mary Zachariah

Subeditors: Kenny Ng and Ahmad Nubly Isahak

Production Editors: Lai Li Kuan and Mohd Ashraf Mohd Rafdzi

Production Team Leader: Helen Santiago

Indexer: Beverley Kirkby

Cover Designer: Mathias Johansson

ABOUT THE AUTHORS

Robin Woellner retired as Pro-Vice Chancellor (Law, Business and the Creative Arts) at James Cook University at the end of 2010, and is currently an Adjunct Professor at James Cook University and the University of New South Wales. He has practised in taxation in the private sector and in the Australian Taxation Office, and taught revenue law and advanced revenue law courses to undergraduates as well as lecturing in other commercial law subjects. He is the author/co-author of numerous books, articles and conference papers.

Stephen Barkoczy is a Professor of Law in the Faculty of Law at Monash University and a member of the Venture Capital Committee of Innovation Australia. Stephen is the author/co-author of several books and articles on taxation law and is a former editor of the *Journal of Australian Taxation*. In 2008, he received the Prime Minister's Award for Australian University Teacher of the Year.

Shirley Murphy has taught in the areas of taxation and superannuation law at a number of tertiary institutions and has acted as a taxation and superannuation consultant to industry groups. She has written in the areas of taxation and superannuation for many years, is the co-author of the *Australian Master Superannuation Guide*, and has contributed over many years to a wide range of publications including the CCH *Australian Master Tax Guide*.

Chris Evans is a Professor of Taxation in the School of Taxation and Business Law (Atax) in the Australian School of Business at the University of New South Wales. He is also an International Research Fellow at the Centre for Business Taxation at Oxford University. He is the author/co-author of numerous books, articles and conference papers, and is the co-editor of the *Australian Tax Review*.

Dale Pinto is a Professor of Taxation Law at Curtin University in Western Australia. Dale has been a member of CPA Australia's Centre of Tax Excellence and is currently Chair of the Taxation Institute's Education, Examinations and Quality Assurance Board (EEQAB). He is the author/co-author of numerous books, refereed articles and national and international conference papers, and is on the editorial board of a number of journals as well as being the Editor-in-Chief of several refereed journals. Dale was appointed to the National Tax Practitioners Board in October 2009 for a three-year term. In March 2011, he was invited to serve on the Board of Taxation's Expert Panel.

CONTENTS

	Page
Foreword to the first edition	v
Preface to the twenty-second edition	vii
About the authors	ix
List of Abbreviations	xii
Key tax websites	xv
1 Introduction to income tax law	1
2 Tax formula, tax rates and tax offsets	67
3 Assessable income: general principles	127
4 Income from personal exertion	157
5 Income from property	199
6 Income from business	233
7 Capital gains tax: general topics	311
8 Capital gains tax: concessions and special topics	419
9 Non-assessable income	493
10 General deductions	535
11 Specific deductions	651
12 Capital allowances and capital works	699
13 Tax accounting	747
14 Trading stock	809
15 Small business entities and concessions	849
16 Taxation of partnership income	871
17 Taxation of trust income	909
18 Taxation of corporate tax entities and their members	979
19 Corporate tax losses, net capital losses and bad debts	1,069
20 Taxation of consolidated groups	1,107
21 Special taxpayers and incentive schemes	1,159
22 Taxation of financial transactions	1,279
23 Superannuation	1,367
24 International aspects	1,427
25 Tax evasion, avoidance and planning	1,579

	Page
26 Fringe benefits tax	1,687
27 Goods and services tax	1,745
28 State taxes	1,821
29 Administrative aspects of taxation	1,869
30 Tax rulings, tax returns, and assessments	1,925
31 Challenging an assessment	1,975
32 Collection and recovery of tax	2,027
33 Offences, penalties and administrative issues	2,103
34 Rates and tables	2,175
Case Table	2,195
Decisions of Boards of Review and AAT (Taxation Appeals Division)	2,243
Legislation Finding List	2,249
Rulings Finding List	2,289
Index	2,295

List of Abbreviations

List of Abbreviations

The following abbreviations are used in the Australian Taxation Law.

AAT	Administrative Appeals Tribunal
ABN	Australian Business Number
ABN Act	<i>A New Tax System (Australian Business Number) Act 1999</i>
ABR	Australian Business Register
ADF	Approved deposit fund
ADI	Authorised deposit-taking institution
ADJRA	<i>Administrative Decisions (Judicial Review) Act 1977</i>
AFOF	Australian venture capital fund of funds
AFTS Report	Australia's Future Tax System Report to the Treasurer (Final Report of the Henry Tax Review)
ANAO	Australian National Audit Office
APRA	Australian Prudential Regulation Authority
ATC	<i>Australian Tax Cases (CCH)</i>
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
AWOTE	Average weekly ordinary time earnings
BAS	Business Activity Statement
BELC	Broad-exemption listed country
CFC	Controlled foreign company
CGT	Capital gains tax
COT	Continuity of ownership test
CPI	Consumer price index
DAC	Departure authorization certificate
DFC of T	Deputy Federal Commissioner of Taxation
DPO	Departure prohibition order
DTA	Double taxation agreement
DVS	Direct value shift
EST	(Australian) Eastern Standard Time
ESVCLP	Early stage venture capital limited partnership
ETP	Employment termination payment
FBT	Fringe benefits tax
FBTAA	<i>Fringe Benefits Tax Assessment Act 1986</i>
FC of T	Federal Commissioner of Taxation
FIF	Foreign investment fund
FIFO	First in first out
FLA	<i>Family Law Act 1975</i>
FLIC	Film licensed investment company
FMD	Farm management deposit
FOIA	<i>Freedom of Information Act 1982</i>
FTC	Foreign tax credit

List of Abbreviations

FTRA	<i>Financial Transaction Reports Act 1988</i>
GIC	General interest charge
GST	Goods and services tax
GVSr	General value shifting regime
HECS	Higher Education Contribution Scheme
HELP	Higher Education Loan Programme
IED	Income equalization deposit
IRDB	Industry Research and Development Board
ISC	Insurance and Superannuation Commissioner
ITAA36	<i>Income Tax Assessment Act 1936</i>
ITAA97	<i>Income Tax Assessment Act 1997</i>
ITAR	Income Tax Assessment Regulations 1997
ITR	Income Tax Regulations 1936
ITRA	<i>Income Tax Rates Act 1986</i>
ITTPA	<i>Income Tax (Transitional Provisions) Act 1997</i>
IVS	Indirect value shifting
LILO	Last in last out
LPR	Legal personal representative
LTA	<i>Land Tax Act 1956</i>
LTMA	<i>Land Tax Management Act 1956</i>
OSSA	<i>Occupational Superannuation Standards Act 1987</i>
PAYE	Pay-as-you-earn
PAYG	Pay As You Go
PDF	Pooled development fund
PPS	Prescribed payments system
PST	Pooled superannuation trust
R&D	Research and development
RBA	Running balance account
RBL	Reasonable benefit limit
RPS	Reportable payments system
RSA	Retirement savings account
RSAA	<i>Retirement Savings Accounts Act 1997</i>
RSAR	Retirement Savings Accounts Regulations 1997
SBT	Same business test
SCTACA	<i>Superannuation Contributions Tax (Assessment and Collection) Act 1997</i>
SCTIA	<i>Superannuation Contributions Tax Imposition Act 1997</i>
SGAA	<i>Superannuation Guarantee (Administration) Act 1992</i>
SGC	Superannuation guarantee charge
SGCA	<i>Superannuation Guarantee Charge Act 1992</i>
SISA	<i>Superannuation Industry (Supervision) Act 1993</i>
SISR	Superannuation Industry (Supervision) Regulations 1994
SME	Small or medium enterprise
SPOR	Shorter period of review (taxpayers)
SSAA	<i>Small Superannuation Accounts Act 1995</i>
STCT	Small Taxation Claims Tribunal

List of Abbreviations

STS	Simplified Tax System
TAA	<i>Taxation Administration Act 1953</i>
TFN	Tax file number
TLIP	<i>Tax Law Improvement Project</i>
TPTACA	<i>Termination Payments Tax (Assessment and Collection) Act 1997</i>
UAP	Uniform administrative penalty
VCA	<i>Venture Capital Act 2002</i>
VCF	Venture capital franking
VCLP	Venture capital limited partnership
VCMP	Venture capital management partnership

Key tax websites

Key tax and tax reform sites

Australia's Future Tax System (Henry Tax Review)	taxreview.treasury.gov.au
Australian Parliament — Internet Tax Resources	www.aph.gov.au/library/intguide/law/taxlaw.htm
Australian Taxation Office	www.ato.gov.au
Board of Taxation	www.taxboard.gov.au
Business Coalition for Tax Reform	www.bctr.org
CCH Australia Ltd	www.cch.com.au

Federal government

AusIndustry	www.ausindustry.gov.au
Australian Business Register	www.abr.business.gov.au
Australian Competition & Consumer Commission (ACCC)	www.accc.gov.au
Australian Government Entry Point	australia.gov.au
Australian Prudential Regulation Authority (APRA)	www.apra.gov.au
Australian Securities & Investment Commission (ASIC)	www.asic.gov.au
Business Entry Point	www.business.gov.au
Commonwealth Ombudsman	www.comb.gov.au
Department of Finance & Deregulation	www.finance.gov.au
Department of Treasury	www.treasury.gov.au
Inspector-General of Taxation	www.igt.gov.au
Parliament House	www.aph.gov.au
Tax Issues Entry System (Ties)	www.ties.gov.au
Treasurer	www.treasurer.gov.au

State and territory revenue offices

Australian Capital Territory	www.revenue.act.gov.au
New South Wales	www.osr.nsw.gov.au
Northern Territory	www.nt.gov.au/ntt/revenue
Queensland	www.osr.qld.gov.au
South Australia	www.treasury.sa.gov.au
Tasmania	www.treasury.tas.gov.au
Victoria	www.sro.vic.gov.au
Western Australia	www.dtf.wa.gov.au

Courts

ACT Supreme Court	www.courts.act.gov.au/supreme
Administrative Appeals Tribunal	www.aat.gov.au
Family Court of Australia	www.familycourt.gov.au
Federal Court of Australia	www.fedcourt.gov.au
High Court of Australia	www.hcourt.gov.au
Supreme Court of NSW	www.lawlink.nsw.gov.au/sc
Supreme Court of Victoria	www.supremecourt.vic.gov.au
Supreme Court of Queensland	www.courts.qld.gov.au
Supreme Court of Tasmania	www.supremecourt.tas.gov.au
Supreme Court of Western Australia	www.supremecourt.wa.gov.au

Other useful sites for source materials

Australasian Legal Information Institute	www.austlii.edu.au
Australian Tax Law Library	www.austlii.edu.au/au/special/tax
ComLaw (Commonwealth Law)	www.comlaw.gov.au
Worldlii	www.worldlii.org

Key tax and superannuation associations/organisations

Association of Superannuation Funds of Australia (ASFA)	www.superannuation.asn.au
Self-Managed Super Fund Professionals' Association of Australia (SPAA)	spaa.asn.au
Taxation Institute of Australia	www.taxinstitute.com.au

Accounting associations/organisations

Association of Taxation & Management Accountants	www.atma.com.au
CPA Australia	www.cpaustralia.com.au
Institute of Chartered Accountants in Australia	www.charteredaccountants.com.au
Institute of Public Accountants	www.publicaccountants.org.au
National Tax & Accountants Association	www.ntaa.com.au

International tax authorities

Canada (Canada Revenue Agency)	www.cra-arc.gc.ca
China (State Administration of Taxation)	www.chinatax.gov.cn
Hong Kong (Inland Revenue Department)	www.ird.gov.hk
Malaysia (Inland Revenue Board of Malaysia)	www.hasil.gov.my
New Zealand (Inland Revenue)	www.ird.govt.nz
Singapore (Inland Revenue Authority of Singapore)	www.iras.gov.sg
United Kingdom (HM Revenue & Customs)	www.hmrc.gov.uk
United States of America (Internal Revenue Service)	www.irs.gov
United States of America (US Department of the Treasury)	www.treasury.gov